UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LOCAL 705 INTERNATIONAL BROTHERHOOD OF TEAMSTERS PENSION FUND, and JOSEPH BAKES, STEPHEN F.G. BRIDGE, JUAN CAMPOS, GREGORY R. FOSTER, SANTOS M. MARINEZ, PHILLIP D. STANOCH, and WILLIAM GIANARAS, as Trustees,	)	
Plaintiffs,	)	
v.	)	**Case No. 1:15-cv-02700**
GROOT RECYCLING & WASTE SERVICE, INC., and GROOT, INC. f/k/a, CROWN RECYCLING & WASTE SERVICES, INC.,	)	**Judge Samuel Der-Yeghiayan**
Defendants.	)	

DEFENDANT'S REPLY MEMORANDUM IN FURTHER
SUPPORT OF THEIR MOTION TO DISMISS COMPLAINT

The Groot Defendants' Motion to Dismiss is premised upon the absence of an existing collective bargaining or other agreement contractually binding the Defendants to continue making fund contributions pursuant to § 502 of ERISA, thus depriving the court of jurisdiction. In response to Defendants' Motion, the Plaintiffs, the Local 705 International Brotherhood of Teamsters Pension Fund ("the 705 Fund") and its Trustees, do not identify the existence of any contractual agreement binding the Groot Defendants to make any contribution to the 705 Fund. Rather, the Plaintiffs exclusively reference the former collective bargaining agreement that they admit expired on September 30, 2013. The Plaintiffs also do not dispute the pertinent provisions of the Declaration of Neil Anderson, Groot's Division Manager, that with respect to contributions made beginning in January 2014, which is the beginning of the time period

Plaintiffs claim the Defendants have failed to make certain contributions to the 705 Fund, Defendants made those contributions -- not pursuant to the 2013 expired collective bargaining agreement -- but, rather pursuant to the draft collective bargaining agreement submitted to Local 731 for signature. While that collective bargaining agreement has not been signed, it clearly evidences the reasons why Defendants made their contributions beginning in January 2014, in direct contravention of Plaintiffs' unsupported contention that Defendants were instead acting in accordance with the expired collective bargaining agreement. Regardless of whether the draft agreement has been fully executed, it minimally demonstrates that the expired 2013 collective bargaining agreement -- is exactly that -- an expired contract which does not create any "contractual link" to bind the Defendants or create jurisdiction under ERISA.

Defendants also object to Plaintiffs' suggestion that discovery is needed to prolong this matter any further. Plaintiffs' Complaint acknowledges the 2013 agreement expired and they have not identified any other agreement that satisfies a jurisdictional prerequisite for their claim under ERISA. Further, Plaintiffs' suggestion that discovery is needed to address whether a 60 day notice was given to prevent a rolling over of the agreement, is simply not necessary where Plaintiffs have specifically alleged in the Complaint that the agreement expired in 2013, implicitly conceding it did not roll over.

It remains that Plaintiffs do not have a jurisdictional basis to maintain their claim under ERISA and costly discovery is not necessary on a deficiency eminently clear from the record before the Court.

I. NO CONTRACT EXISTS TO CREATE JURISDICTION UNDER ERISA

Plaintiffs acknowledge in their response brief that the agreement which they claim forms the jurisdictional basis for their claims is the October 1, 2008 - September 30, 2013 collective bargaining agreement. (Plaintiffs' Response, p. 4) The threshold problem with Plaintiffs' contention is that collective bargaining agreement "expired" on September 30, 2013, as Plaintiffs expressly concede in their own complaint. (Dkt. #1 at par. 9) Plaintiffs do not identify any other contractual agreement that governs or obligates the Defendants to continue to make any contributions to the Local 705 Fund. Plaintiffs specifically do not contend that there is any new collective bargaining agreement that exists after September 30, 2013 that creates a contractual obligation of Defendants to contribute to the 705 Fund.

Plaintiffs' own case authorities actually support dismissal of the Complaint. Plaintiffs cite to multiple cases to support their proposition that the expired collective bargaining agreement is the "contractual hook" for jurisdiction purposes for the ERISA claims before this Court. Plaintiffs' authorities are all distinguishable as in each case there were existing unexpired contracts which formed the basis of the claims that contributions were owed. In Robbins v. Lynch Trucking Service, 836 F.3d 330 (7th Cir. 1998), the employer had made contributions pursuant to a collective bargaining agreement that expired. However, a new multi-employer agreement was reached following the expiration of the prior agreement. The employer in Robbins claimed, however, that it had never signed the new multi-employer agreement and therefore was not bound to its terms. As a threshold matter, the plaintiffs in Robbins were not relying upon an expired collective bargaining agreement as their "contractual hook;" they were relying on a new multi-employer agreement. In addition, the employer in Robbins had submitted a separate document expressly representing that they intended to sign the new contract. The court held that the employer's subsequent actions in conformity with the ***new*** agreement further reflected an adoption of the subsequent collective bargaining agreement. Of course, in the instant case before this Court, there is no subsequent collective bargaining agreement that replaced the expired 2013 agreement.

Plaintiffs also rely on the decision in Brown v. C. Volante Corp., 194 F.3d 351 (2nd Cir. 1999), for the proposition that an employer's course of conduct manifests an intention to be bound by subsequent unsigned collective bargaining agreements. In Brown, there was a collective bargaining agreement that expired on June 30, 1990. The employer did not sign the two subsequent collective bargaining agreements which governed the period between July 1, 1990 to June 30, 1996. While the employer did not sign off on those collective bargaining agreements, remittance reports were submitted which reflected the contributions were submitted after July 1, 1990 "[i]n Accordance with the standard industry agreement with Local 282, I.B.T." Id. at 353. In addition to the fact that there were collective bargaining agreements in effect for the time period to which the Fund claimed they were entitled to contributions, there was additional evidence that the employer had executed a written acknowledgement of its "responsibility to the funds." Id. The evidence of the employer's written communication was held to have supported adoption of the unsigned collective bargaining agreements that were in place following the expiration of the prior collective bargaining agreement. Id. at 356.

In the present case, not only is there no collective bargaining agreement in place for the time period for which Plaintiffs seek contributions, the only evidence before the Court is that the Defendants made contributions from January 2014 forward, ***not*** based on the expired collective bargaining agreement, but rather on the contemplated new agreement with 705 that they believed was in effect. See Anderson Affidavit para. 6, Anderson Aff. Ex. 1, the proposed new collective bargaining agreement with Local 731. Thus, not only is the document relied upon by the Plaintiffs an expired collective bargaining agreement, the only evidence that is in the record reflects that the contributions made by Defendants after January 2014, were made based on a totally different agreement, regardless of whether or not it had been executed by all the parties involved.

Plaintiffs also rely on the decision in Local 387 Pension Fund v. Southern Stress Wire Corp., 724 F.2d 1458 (11th Cir. 1983). In that case as well, the court determined that the employer had adopted an existing collective bargaining agreement by, *inter alia*, securing virtually all of its labor from the applicable union hiring hall and paying its employees in conformity with the pay scale established in the existing collective bargaining agreement. Given that the court in Southern Stress was also relying on an existing collective bargaining agreement, that case is equally distinguishable from the facts before this Court where there is no existing collective bargaining agreement.

As set forth in Defendants' original motion to dismiss, the decisions in Midwest Operating Engineers Welfare Fund v. County of Mercer, Case No. 14-C-2436, 2014 W.L. 5821795 (N.D. Ill. November 10, 2014) and Dugan v. R.J. Corman R. R. Co., 334 F.3d 662 (7th Cir. 2003), clearly control and confirm that this Court does not have jurisdiction over Plaintiffs' claim for alleged unpaid contributions under ERISA. The court in Mercer recognized that where there is an expired collective bargaining agreement, the continued submission of contribution reports does not satisfy the "contractual hook" for purposes of establishing jurisdiction under ERISA. The court in Mercer specifically rejected the argument that the employer had adopted the expired collective bargaining agreement by continuing to contribute to the fund after expiration of that agreement. Similar to the Plaintiffs in this case, the Mercer plaintiffs were unable to identify any other document or agreement that created a contractual obligation of the employer. The plaintiffs' submission of an affidavit and contribution reports in Mercer, similar to the allegations made by the Plaintiffs in this case, simply did not satisfy the jurisdiction prerequisite that there must be a binding contractual obligation on behalf of the employer. The affidavit submitted by the 705 Fund's Administrator, Jack Witt, states little more than the fact the Defendants continued to make contributions at a rate similar under the expired agreement (until January 2014) and that they submitted related contribution reports. That argument did not carry the day in Mercer and does not create any issue of fact for purposes of generating a jurisdictional basis under ERISA before this Court. Moreover, the Defendants' contributions after September 30, 2013, were in conformity with the negotiated, yet unsigned collective bargaining agreement between Defendants and Local 731. Moreover, Plaintiffs' claim for unpaid contributions is actually based on their contention that Defendants did ***not*** comply with the terms of the now long expired agreement, only further undermining their argument that Defendants acted in conformity with the very agreement they claim was not followed.

In addition, Plaintiffs do not even mention in their response brief, and thus apparently concede, the 7th Circuit's holding in Dugan, that, following the expiration of a collective bargaining agreement, and during the time the parties are continuing to negotiate a new agreement, the employer is not contractually obligated under ERISA to continue contributing to a fund. Id. 334 F.3d at 669. Moreover, as the 7th Circuit commented in Dugan regarding the expired collective bargaining agreement, which is instructive in this case, "if no agreement is in force, there is nothing for [the employer] to adhere to." Id. at 668.

Similar to the Groot defendants in this case, the employer in Dugan continued to make certain contributions to the multi-employer welfare and pension funds following the expiration of the applicable collective bargaining agreement and for seven months of contributions also submitted signed contribution reports to the funds which stated "the undersigned employer, if not already a signatory hereby becomes a signatory party to the current applicable Collective

Bargaining Agreement." Id. at 667. Neither the continued contributions nor the related reports were deemed sufficient to establish a binding contractual obligation for purposes of the Plaintiff's ERISA claim.

The Dugan court minimized the significance of the employer's submission of continued contributions, noting they may have been simply made to satisfy the employer's obligation to maintain the status quo while negotiations continued for a new agreement, an obligation under the National Labor Relations Act, a statutory as opposed to a contractual obligation. Id. at 669. (Citations omitted)

The contribution reports in this case contain similar language to that rejected in Dugan for purposes of creating a contractual obligation pursuant to §502 of ERISA:

> "that each and every person whose name is set forth above and for whom contributions are being made is an employee of the Employer and covered by a written collective bargaining agreement between the Employer and Local Union, for the period of time for which the contributions are being made"

(Complaint. ¶10) The above language also references contributions made for an employee covered by a collective bargaining agreement for the period of time for which the contributions were being made. There is no dispute that the collective bargaining agreement relied upon by Plaintiffs expired on September 30, 2013, and thus no agreement existed covering the time period after that expiration, including for contributions made by Defendants after January 1, 2014.

Accordingly, because it is undisputed that no collective bargaining agreement exists for any time period after September 30, 2013, there is no subject matter jurisdiction and, like the Court in Mercer, Defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(i) should be granted.

II. DISCOVERY IS NOT NECESSARY WHERE IT IS UNDISPUTED PLAINTIFF'S CLAIM IS BASED UPON THE EXPIRED SEPTEMBER 30, 2013 AGREEMENT

Plaintiffs request, in the alternative, that if the Court believes it must consider matters outside of the Complaint in order to resolve the Defendants' motion, the Plaintiffs should be given leave to conduct discovery in order to more fully respond to the motion to dismiss. Because the Court can rely on the Complaint as drafted by the Plaintiffs, discovery in this case is absolutely unnecessary.

It is Plaintiffs' obligation to establish the contractual basis for which they claim Defendants have an obligation under ERISA to continue to make contributions after the expiration of the September 30, 2013 collective bargaining agreement. The Plaintiffs maintain in their Complaint, and further acknowledge in their response to the motion to dismiss, that the only document upon which they based their claim is the expired collective bargaining agreement. Given the above holdings in Dugan and Mercer, the reliance on an expired collective bargaining agreement clearly does not satisfy the jurisdictional prerequisite for an ERISA claim. Discovery is not needed on this point.

Moreover, separate and apart from the lack of any claimed existing collective bargaining agreement binding the Defendants, the Defendants have set forth the reason explaining why they made contributions after the expiration of the collective bargaining agreement, that being their belief that they had entered into a new agreement with Local 731, an agreement which has yet to be signed. That document is attached to Defendants' motion to dismiss along with the affidavit of Mr. Anderson. It is difficult to comprehend what discovery would be necessary as the document upon which Defendants rely is in the record.

Further, Plaintiffs request to seek discovery to determine the extent to which Groot complied with the expired collective bargaining agreement, in regards to having given notification during the 60-day period prior to September 30, 2013 (to prevent that agreement from rolling over on a year-to-year basis.) This is simply a moot point given the fact Plaintiffs have conceded in their Complaint, as well as in their response to the motion to dismiss, that the agreement expired, therefore implicitly conceding the 60-day notice period had to have been satisfied.

Engaging in continued discovery would be nothing more than an unnecessary expenditure of time and money. The Court can rule upon the existing motion without the need for additional discovery. Accordingly, Defendants request that the Court deny Plaintiffs' alternative request to conduct discovery.

III. CONCLUSION

WHEREFORE, for the above stated reasons, together with those set forth in Defendants' Motion to Dismiss, Defendants request that this matter be dismissed for lack of jurisdiction.

Dated: August 3, 2015

GROOT RECYCLING & WATER SERVICE, INC. and GROOT, INC.

By: /s/James J. Convery
One of Its Attorneys

James J. Convery
Laner Muchin, Ltd.
515 North State Street, Suite 2800
Chicago, Illinois 60654
(312) 467-9800
(312) 467-9479 (fax)

CERTIFICATE OF SERVICE

I, James J. Convery, an attorney, hereby certify that on August 3, 2015, I caused to be served a copy of the foregoing **Defendants' Reply Memorandum In Further Support of Their Motion to Dismiss Complaint**, in the above-captioned matter to be filed with the Clerk of the District Court and served on the parties of record, including those listed below, by operation of the Court's CM/ECF electronic filing system, addressed to:

James P. Daley
Edward M. Graham
Jackson Lewis, P.C.
150 North Michigan Avenue
Suite 2500
Chicago, IL 60601
james.daley@jacksonlewis.com
edward.graham@jacksonlewis.com

/s/James J. Convery
James J. Convery